INDEX

	Page
OPINION BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
Background	3
District Court Proceedings	4
Proceedings in the Court of Appeals	5
REASONS FOR GRANTING THE WRIT	5
CONCLUSION	14
APPENDIX A	1a
APPENDIX B	8a
APPENDIX C	9a
APPENDIX D	13a
APPENDIX E	14a

CITATIONS

CASES:

Alexander v. *Gardner Denver Co.*, 415 U.S. 36, 94 S.Ct. 39 L.Ed.2d 147 (1974)	11
Allied Air Freight, Inc. v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir. 1968)	9
Archibald v. *Pan American World Airways, Inc.*, 460 F.2d 14 (19th Cir. 1972)	11
Bell v. *Hood*, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946)	6
Beryllium Corp. v. *United States*, 449 F.2d 362 (Ct.Cl. 1971)	10

Page

Binderup v. *Pathe Exchange*, 263 U.S. 291, 44 S.Ct. 96, 68 L.Ed. 308 (1923) 7
Brotherhood of Railroad Trainmen v. *Howard*, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1952) 13
Civil Aeronautics Board v. *Aeromatic Travel Corp.*, 341 F.Supp. 271 (E.D.,N.Y. 1971) 10
Comprehensive Group Health Serv. Bd. of Dir. v. *Temple Univ.*, 363 F.Supp. 1069 (E.D., Pa. 1973) 10
Conley v. *Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed. 2d 80 (1957) 13
Cunningham v. *Erie R.R. Co.*, 266 F.2d 411 (2d Cir. 1959) 12
Gallagher v. *Alitalia — Lines Aeree Italiane, S.P.A.*, 361 F.Supp. 1097 (S.D., N.Y. 1973) 11
Galveston H & S.A. Ry. Co. v. *Wallace*, 223 U.S. 481, 32 S.Ct. 205, 56 L.Ed. 516 (1911) 9
Graham v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232, 70 S.Ct. 14, 94 L.Ed. 22 (1949) 13
Macklin v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (D.C.Cir. 1973) 12
Mortimer v. *Delta Air Lines*, 302 F.Supp. 276 (N.D., Ill. 1969) 10
Nader v. *Allegheny Airlines, Inc.*, 365 F.Supp. 128 (D.D.C. 1973) 11
Southern Pilots Association v. *Civil Aeronautics Board*, 323 F.2d 288, 116 U.S.App.D.C. 283 (1963), cert.den. 376 U.S. 954 (1964) 11, 12
S.S.W. Inc. v. *Air Transport Association of America*, 191 F.2d 658 (D.C.Cir. 1951) cert.den. 343 U.S. 955, 72 S.Ct. 1049, 96 L.Ed. 1355 .....7, 8
Steele v. *Louisville & National R.R.*, 323 U.S. 192, 65 S.Ct. 226, 89 L.Ed. 173 (1944) 13
Sundstrand Turbo v. *United States*, 389 F.2d 406 (Ct. Cl. 1968) 10
Tunstull v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 65 S.Ct. 235, 89 L.Ed. 187 (1944) 13
United States v. *Bilori Municipal School Dist.*, 219 F. Supp. 691, (S.D. Miss. 1963); aff'd 326 F.2d 237 (1963); cert.den. 379 U.S. 929 (1964) 9
Wills v. *United States*, 384 F.2d 943 (9th Cir. 1967).. 10

Page

STATUTES:

Age Discrimination in Employment Act, 81 Stat. 602, 29 U.S.C. 621, 626(b) (1967) 4, 7
Railway Labor Act, 45 U.S.C. 151, 156 and 152 seventh . 4, 7
Fair Labor Standards Act, 29 U.S.C. 217 2
Federal Aviation Act,
49 U.S.C. 1506 8
49 U.S.C. 1374(b) 10
28 U.S.C. 1331 5
28 U.S.C. 1337
Civil Rights Act of 1964, 42 U.S.C. 1981 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No.

W. PETER CAREY, et al, *Petitioners,*

v.

J. J. O'DONNELL, President of Air Line Pilots Association, et al, *Respondents*

GEORGE S. CHAUDOIN, et al, *Petitioners,*

v.

AIR LINE PILOTS ASSOCIATION, et al, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in these proceedings on August 19, 1974.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the District of Columbia Circuit has not been re-

ported, but is included as Appendix A. The initial rulings of the United States District Court for the District of Columbia also are not reported but are included as Appendix B and Appendix C.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on August 19, 1974. By letter dated November 1, 1974 counsel was informed by the Clerk of that Court that there were insufficient votes for a rehearing *en banc*. The jurisdiction of this Court is founded on 28 U.S.C. § 1254(1).

STATUTES INVOLVED

In *Carey, et al* v. *O'Donnell, et al,* jurisdiction of the Complaint was founded on the Railway Labor Act, 44 Stat. 577 (1926), 45 U.S.C. §§ 151, 156 and 152, seventh.

In *Chaudoin, et al* v. *Air Line Pilots Association,* jurisdiction of the Complaint was founded on the Age Discrimination in Employment Act, 81 Stat. 602 (1957), 29 U.S.C. 621, 623(2) and 626(c), and the Fair Labor Standards Act, 52 Stat. 1069 (1938), 29 U.S.C. § 217.

The pertinent statutory language is set forth in Appendix E.

QUESTION PRESENTED

Did the Court of Appeals err in holding that the District Court had no jurisdiction to these claims alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. 621, et seq. and the Railway Labor Act, 45 U.S.C. 151, et seq.?

STATEMENT OF THE CASE

Background

On May 19, 1972 the Civil Aeronautics Board approved a merger of Northeast Airlines and Delta Air Lines. The exclusive bargaining agent for both pilot groups was the Air Line Pilots Association, representing 540 Northeast pilots and 2,200 Delta pilots, which proceeded to effect its own internal procedures for integration of the two pilot seniority lists. A merged seniority list was proposed and immediately repudiated by the Northeast pilots. However, the president of the union refused to recognize the rejection of the list by the Northeast pilots.

The Northeast pilots filed a complaint in the United States District Court for the District of Columbia which sought to enjoin the execution of a collective bargaining agreement between the Air Line Pilots Association and Delta Air Lines which incorporated the seniority lists.[1]

The complaint for the injunction was denied and the Northeast pilots petitioned the Civil Aeronautics Board for the exercise of reserved jurisdiction under the original merger Order. The CAB however declined to exercise jurisdiction.[2]

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[1] *Northeast Pilots MEC* v. *O'Donnell*, CA 1911-72. This judgment was not appealed.

[2] *Carey*, JA, pp. 26-32. The Order denying the petition stated in pertinent part: "As reiterated in past cases of a similar nature, we do not intend that our dismissal of the dissatisfied employees' petition should abridge their right to pursue such other remedies as may be available to them."

District Court Proceedings

On March 29, 1973, W. Peter Carey and four other plaintiffs instituted a class action on behalf of all former Northeast pilots in the District Court against the president of the Air Line Pilots Association and the union alleging invidious discrimination, breach of duty of fair representation in the negotiation of a collective bargaining agreement and violation of the Railway Labor Act (45 U.S.C. § 151, et seq.).

The defendants answered with a Motion to Dismiss, claiming, *inter alia,* that the court lacked jurisdiction over the subject matter.

On May 1, 1973 the District Court granted the Motion to Dismiss for lack of subject matter jurisdiction. The Order by the Court stated that ". . . exclusive jurisdiction over this controversy lies with the Civil Aeronautics Board . . .". (Appendix B)

Plaintiffs filed a Motion for Reconsideration (*Carey,* JA, p. 89) which was denied by the District Court on May 29, 1973 (*Carey,* JA, p. 99). The Court did not grant a hearing on the Motion to Dismiss nor on the Motion for Reconsideration.

On April 19, 1973 George S. Chaudoin and three other former Northeast pilots instituted action against the Air Line Pilots Association and Delta Air Lines pursuant to the Age Discrimination in Employment Act (29 U.S.C. § 626(b)). This was a class action on behalf of all former Northeast pilots over the age of forty. Both defendants filed motions to dismiss and on June 15, 1973, without a hearing, the District Court dismissed the case relying on its prior dismissal in *Carey,* stating ". . . that exclusive jurisdiction over

the issue raised in connection with the seniority list lay with the CAB". (Appendix C)

Proceedings in the Court of Appeals

The plaintiffs noted an appeal from the dismissal in *Carey* on May 31, 1973 and in *Chaudoin* on July 2, 1973, both to the United States Court of Appeals for the District of Columbia Circuit. The Court affirmed the dismissal by the District Court in an Opinion dated August 19, 1974 (Appendix A, *infra*). The Opinion stated that "... the District Court has no jurisdiction over the actions below ..." (Appendix A, p. 7a)

A Suggestion for Rehearing en Banc was timely filed in both cases, but on November 1, 1974, counsel was informed that a majority of the Circuit judges was not in favor of a rehearing. (Appendix D)

REASONS FOR GRANTING THE WRIT

These cases were dismissed without a hearing on the basis that the District Court lacks jurisdiction. However, both complaints were founded on federal statutes and there was no dispute that the prerequisite jurisdictional amount was met. It is submitted that the dismissal of petitioners' actions by the District Court and the affirmance by the Court of Appeals was in total disregard of the absolute wording of the federal jurisdictional statute, 28 U.S.C. 1331(a), which states:

> "The district court shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, ... and arises under the Constitution, laws, or treaties of the United States."

In both *Carey* and *Chaudoin* the violation of a federal law is alleged, and in both cases the amount in

controversy exceeds $10,000. In such a situation the federal courts have no choice but to exercise jurisdiction over such matters. Federal jurisdiction exists if the complaint states a case arising under federal law, even though on the merits the party may have no federal right. If his claim is bad, the judgment is to be given against him on the merits, and even if the court is persuaded that federal law does not give the right the party claims, it is to dismiss for failure to state a claim on which relief can be granted rather than for want of jurisdiction.

Various federal courts have made strong statements concerning the distinction between deciding a case on jurisdictional grounds as opposed to deciding a case on the merits. In *Bell* v. *Hood,* 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939, a plaintiff sued various F.B.I. agents, alleging damages when the agents imprisoned the plaintiff in violation of his fourth and fifth amendment rights. The agents argued that the plaintiff could not recover damages under either the Constitution or laws of the United States, since neither expressly provided for the recovery of money damages for the violation of constitutional rights. Both the district court and the court of appeals accepted the agents' argument and dismissed the case for lack of federal court jurisdiction. In reversing these holdings and granting the plaintiff federal court jurisdiction, the Supreme Court stated:

> "Jurisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause

> of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy."

In the instant cases, the Railway Labor Act, 45 U.S.C. 151, et seq. and the Age Discrimination in Employment Act, 29 U.S.C. 621, et seq., afford remedies to aggrieved persons and, as opposed to *Bell, supra,* a federal cause of action and a federal remedy are specifically stated.

The case of *Binderup* v. *Pathe Exchange,* 263 U.S. 291, 44 S.Ct. 96, 68 L.Ed. 303 (1923), also discussed the meaning of federal court jurisdiction, stating:

> "Jurisdiction is the power to decide a justiciable controversy . . . A complaint setting forth a substantial claim under a federal statute presents a case within the jurisdiction of the court as a federal court; and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven. Its decision either way upon either question is predicated upon the existence of jurisdiction, not upon the absence of it." 263 U.S. 291, 303.

The petitioners here do not submit on the merits, but on the denial of a forum on a jurisdictional basis when the statutory right is clear. It is respectfully urged that unless this Court grants the petitioners their day in court, the usefulness of federal anti-discrimination statutes will be greatly diminished if their enforcement can be so easily subverted.

In *S.S.W. Inc.* v. *Air Transport Association of America,* 191 F.2d 658 (D.C.Cir. 1951), cert.den., 343

U.S. 955, 72 S.Ct. 1049, 96 L.Ed. 1355 (1952), plaintiffs alleged a combination in restraint of trade. The district court dismissed, holding that the alleged combination was subject to the primary jurisdiction of the Civil Aeronautics Board. The circuit court agreed that plaintiffs should have first sought relief from the CAB, but directed the district court to retain jurisdiction "while appellant seeks his remedies from the Board . . ." *id.* at 664. Thus, if the Board refused to act on any aspect of the plaintiff's request for relief, that refusal to act was not meant to bar the suit in district court. This holding was based primarily upon a provision of the Civil Aeronautics Act, 49 U.S.C. § 676, now recodified as 49 U.S. § 1506 (1963) of the Federal Aviation Act, that

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

The court made it clear that remedies other than an appeal to the CAB could be invoked.

> "What we are saying is that the same set of facts may give rise to both a violation of the Civil Aeronautics Act and a violation of the antitrust laws. Although the second does not necessarily follow from the first but is bottomed upon its own statutory standards, the antitrust remedy of triple damages is not defeated by the fact that the Civil Aeronautics Act is also violated." 191 F.2d 658, 664.

In the instant cases, given the wording of 49 U.S.C.A. § 1506 and the holding in *S.S.W. Inc., supra,* the district court should certainly have jurisdiction to adjudicate the alleged violations of the two federal statutes.

Furthermore, the CAB, in refusing to exercise its "retained jurisdiction", did not attempt to preclude the plaintiffs from pursuing their remedies elsewhere. In fact, the CAB seemed to be going out of its way in suggesting that other remedies were indeed available to the plaintiffs. (Footnote 2, *supra*) Thus, as in *S.S.W. Inc., supra,* the Supreme Court should reverse and hold that the district court has jurisdiction to hear the plaintiffs' allegations of violations of the federal statutes that were not heard by the CAB. Accord, *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.,* 393 F.2d 441 (2d Cir. 1968).

In the instant case there is no "dual jurisdiction" between the CAB and the federal court concerning the petitioners' causes of aciton. Contrary to the defendant's assertions that the plaintiffs are contesting only the integration of the airlines' seniority list, so that the CAB would retain jurisdiction over the case, the plaintiffs are in fact alleging hostile discrimination and age discrimination on the part of the defendants. This involves much more than simply the integration of seniority lists since specific federal statutes have been violated, and as such the federal court is the only forum where the plaintiffs can enforce their rights.

The rule was well stated in *Galveston H.&S.A. Ry. Co.* v. *Wallace,* 223 U.S. 481, 32 S.Ct. 205, 56 L.Ed. 516 (1911), that:

> "Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right." Id. at 490.

See also *United States* v. *Bilori Municipal School District,* 219 F.Supp. 691 (S.D.Miss. 1963), aff'd 326

F.2d 237 (1963), cert.den. 379 U.S. 929 (1964). Thus, given the authority of the above cases, it is submitted that the proper place for the enforcement of the Railway Labor Act and the Age Discrimination in Employment Act is not in the CAB but in the federal courts, as the statutes themselves specify. As stated in *Civil Aeronautics Board* v. *Aeromatic Travel Corp.*, 341 F.Supp. 271 (E.D., N.Y. 1971), questions designated as "law" questions must be determined by courts, rather than by agencies, so as to insure the uniform application and interpretation of statutes. Furthermore, where the particular issue involved deals with the enforcement of a federally-created right, and is not one addressed to a particular area of administrative expertise, the federal court, not the agency, should decide the legal issue. *Wills* v. *United States,* 384 F.2d 943 (9th Cir. 1967); *Comprehensive Group Health Serv. Bd. of Dir.* v. *Temple Univ.,* 363 F.Supp. 1069 (E.D. Pa. 1973). And even where an agency decides a question of law, it has been repeatedly held that a federal court is not bound by the agency's decision. *Beryllium Corp.* v. *United States,* 449 F.2d 362 (Ct. Cl. 1971); *Sundstrand Turbo* v. *United States,* 389 F.2d 406 (Ct. Cl. 1968).

In *Mortimer* v. *Delta Airlines,* 302 F.Supp. 276 (N.D. Ill. 1969), plaintiff sued in district court after being bumped from an oversold flight. Defendant moved to dismiss for lack of jurisdiction. The court, however, held that 28 U.S.C. § 1337 grants original jurisdiction to the district courts of "any civil action or proceeding arising under any act of Congress regulating commerce", citing the Federal Aviation Act.

In *Mortimer,* the statute upon which the plaintiff's cause of action was based was 49 U.S.C. 1374(b) and,

as here, the CAB has allegedly provided a remedy. However, in spite of this available remedy, the *Mortimer* court allowed a private civil suit. In the instant actions, petitioners' case for relief is much stronger than in *Mortimer*. Congress has already provided a specific civil remedy for both *Carey* and *Chaudoin*, i.e. the Railway Labor Act and the Age Discrimination in Employment Act. It would be manifest injustice to deny petitioners their statutory rights.

Mortimer has been followed in *Archibald* v. *Pan American World Airways, Inc.*, 460 F.2d 14 (9th Cir. 1972); *Gallagher* v. *Alitalia-Lines Aeree Italiane, S.P.A.*, 361 F.Supp. 1097 (S.D., N.Y. 1973); and *Nader* v. *Allegheny Airlines, Inc.*, 365 F.Supp. 128 (D.D.C. 1973).

This Court's recent decision in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. —, 39 L.Ed. 147 (1974) is also in point. The unanimous opinion held that an employee's right to a trial *de novo* under Title VII of the Civil Rights Act was not foreclosed by the prior submission of the claim to final arbitration under the nondiscrimination clause of a collective bargaining agreement. The court stated:

> "Legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination . . . in general, submission of a claim to one forum does not preclude a later submission to another." 415 U.S. at 43.

The decision in this case is directly contrary to the opinion of the D.C. Circuit in *Southern Pilots Association* v. *Civil Aeronautics Board*, 323 F.2d 288, 116 U.S.App.D.C. 283 (1963), cert.den. 376 U.S. 954 (1964).

The Court, in the instant case, states at page 7 of the slip opinion that "Our decision in *Southern Pilots Association* v. *CAB* is not to the contrary." It is respectfully submitted that this is incorrect. The following is the particular language in *Southern Pilots* which is contra to this case:

> "The Board, as it pointed out in its opinion denying petitinoners' application for rehearing and intervention, has no jurisdiction to pass upon designations of bargaining agents or charges of discrimination in the representation function." 323 F.2d at 290.

Yet the Court in this case stated that the ". . . District Court has no jurisdiction over the actions below . . ." Slip opinion. (Appendix A, p. 7a)

This decision is also contrary to *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979 (1973) which was also decided by the D.C. Circuit. This too was a senority dispute which had been arbitrated. Plaintiffs then filed a class action alleging discrimination under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 1981. The District Court dismissed for lack of jurisdiction. The Circuit Court reversed, holding that,

> ". . . it makes little sense to bar Macklin from judicial consideration of his claim of racial discrimination in circumstances where, as we pointed out, the grievance adjustment body not only was given no opportunity to adjudicate it, but also lacked power under the contract to act against racial discrimination." 478 F.2d at 991.

The identical jurisdictional issue was presented in *Cunningham* v. *Erie R.R. Co.*, 266 F.2d 411 (2nd Cir. 1959). An employee filed suit against the union and

the carrier contending that he had been discriminated against. The complaint was dismissed by the District Court with the view that the dispute should be heard before the National Railroad Adjustment Board. The Circuit Court reversed and held that "This dispute based upon alleged discrimination is between the employee and the union, not between either an employee or a union and the railroad . . ." 266 F.2d at 415.

The court further cited a "long line of Supreme Court cases . . ." in support of jurisdiction.[3] All of these cases "construed the Railway Labor Act as requiring union representation to be exercised without 'hostile discrimination' toward any one group". The Court further rejected the argument that jurisdiction was vested in the Adjustment Board.

Cunningham goes on to discuss why hostile discrimination cases, other than those based on race or color, must have a jurisdictional basis in the federal court, concluding that "as a matter of common sense, it does not seem rational to restrict 'hostile discrimination' to any one particular group of cases. Moreover, Cunningham is also claiming violations of the specific requirement of the Railway Labor Act . . ."

Similarly, petitioners here allege hostile discrimination and a specific violation of the Railway Labor Act. Either is sufficient to state a cause of action for jurisdiction by the district court.

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[3] *Steele* v. *Louisville & National R.R.*, 323 U.S. 192, 65 S.Ct. 226 (1944), 89 L.Ed. 173; *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 72 S.Ct., 1022 (1952), 96 L.E. 1283; *Conley* v. *Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957), 2 L.Ed.2d 80; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210, 65 S.Ct. 235 (1944), 89 L.Ed. 187; *Graham* v. *Brotherhood of Locomotive Firemen*, 338 U.S. 232, 70 S.Ct. 14 (1949), 94 L.Ed. 22.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1608

W. PETER CAREY, ET AL., APPELLANTS

v.

J. J. O'DONNELL, (PRESIDENT OF AIR LINE PILOTS ASSOCIATION), ET AL.

No. 73-1783

GEORGE S. CHAUDOIN, ET AL., APPELLANTS

v.

AIR LINE PILOTS ASSOCIATION, ET AL.

Appeals from the United States District Court for the District of Columbia

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Argued 18 April 1974

Decided 19 August 1974

J. Gordon Forester, Jr., with whom *Robert S. Perkins* and *Walter J. Smith, Jr.* were on the brief, for appellants.

Gary Green, for appellees J. J. O'Donnell and Air Line Pilots Association.

Frank F. Rox, with whom *Robert Reed Gray* was on the brief, for appellee Delta Air Lines, Inc.

Before: EDWARDS,* *United States Circuit Judge* for the Sixth Circuit, TAMM and WILKEY, *Circuit Judges*

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* Sitting by designation pursuant to 28 U.S.C. § 291(a).

Opinion for the Court filed by *Circuit Judge* WILKEY.

WILKEY, *Circuit Judge:* These consolidated appeals[1] arise out of the merger between Delta Air Lines, Inc., and Northeast Airlines, Inc. approved by the Civil Aeronautics Board 24 April 1972.[2] Before us are appeals from dismissals by the District Court of actions raising various challenges to that order. Central to both appeals is the issue whether the District Court lacks jurisdiction to entertain a collateral attack upon an order of the Board approving an airline merger, subject to labor protective provisions, and upon the Board's refusal to exercise its reserved jurisdiction to set aside an integrated seniority list negotiated by the parties' freely chosen representatives. For reasons more fully explained below, we affirm the District Court.

I. BACKGROUND—THE DISTRICT COURT'S ACTIONS

A. *Carey* v. *O'Donnell*

W. Peter Carey and four other former Northeast Airlines pilots filed the class action below against the Air Line Pilots Association and its president, J. J. O'Donnell, alleging (1) invidious discrimination, (2) breach of duty of fair representation in the negotiation of a collective bargaining agreement, and (3) violations of the Railway Labor Act ("the RLA").[3] Plaintiffs sought declaratory and injunctive relief against the enforcement by the defendants of the agreement of 26 October 1972, wherein

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[1] These appeals were consolidated by this court's order of 1 August 1973.

[2] Orders Nos. 72-5-73 and 72-5-74, Docket 23315. Reference is made to our opinion in the companion case, *Northeast Master Executive Council* v. *CAB*, 73-1595, for a more comprehensive background statement of the litigation which followed the Board's order.

[3] 45 U.S.C. § 151 *et seq.*

ALPA and Delta incorporated the integrated seniority list complained of.[4]

Pursuant to FED. R. CIV. P. 12(b)(1) and (6), defendants moved to dismiss the complaint on the grounds that

> "(a) The Court lacks jurisdiction over the subject matter of the action; and
>
> "(b) The Complaint is barred by a prior judgment; and
>
> "(c) The Complaint fails to state a claim upon which relief can be granted."[5]

Alternatively, defendants moved for summary judgment "on the basis of the Complaint, and the affidavit and exhibits attached to [the] motion."[6]

The District Court dismissed the complaint on the authority of *Northeast Pilots Master Executive Council* v. *O'Donnell and ALPA*,[7] and *Hyland* v. *United Air Lines, Inc.*,[8] holding that "exclusive jurisdiction over this controversy lies with the Civil Aeronautics Board . . . ."[9] Plaintiffs' motion for reconsideration was denied.

B. *Chaudoin* v. *ALPA*

George S. Chaudoin and three other former Northeast Airlines pilots filed the class action below against the Air

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[4] The pilots also sought "[d]amages against the Air Line Pilots Association for its refusal to represent the plaintiffs and the destruction of their rights as flight deck crew members in the amount of Seventy-Five Million Dollars ($75,000,000.00)." *Carey* Joint Appendix [hereafter App.] at 8.

[5] *Carey* App. at 9.

[6] *Carey* App. at 10.

[7] Civil No. 1911-72 (D.D.C., 4 October 1972).

[8] 254 F. Supp. 367 (N.D. Ill. 1966).

[9] *Carey* App. at 88.

Line Pilots Association and Delta Air Lines, Inc., alleging violations of the Age Discrimination in Employment Act of 1967 ("the ADEA").[10] Plaintiffs sought a declaration that the agreement of 26 October 1972 incorporating the integrated seniority list was in violation of the ADEA.[11] Asserting the same grounds as in *Carey*, and that "the complaint is a collateral attack on an order of an Administrative Agency, the Civil Aeronautics Board, and it [*sic*] not permitted under the law,"[12] defendants moved for dismissal of the complaint or in the alternative for summary judgment.

The District Court found that while the membership in the class below was somewhat smaller than that alleged in *Carey*, all members of the *Chaudoin* class were also members of the *Carey* class. The court also found that while the action in *Carey* was based on unfairness under the RLA and the action in *Chaudoin* on illegal age discrimination under the ADEA, each complaint questioned the validity of the integrated seniority list and therefore raised the same substantive issues. Accordingly, the court held that between plaintiffs and the defendant ALPA, the decision in *Carey* was *res judicata*. Between plaintiffs and the defendant Delta, the doctrine of collateral estoppel applied.[13] The instant appeal is from those holdings.

II. Exclusive Jurisdiction of the Board and the Courts of Appeals

Today in *Northeast Master Executive Council* v. *CAB*,[14] we affirm the Board's refusal to set aside the integrated

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[10] 29 U.S.C. § 621 *et seq.*

[11] Plaintiffs also sought liquidated and punitive damages "in such amounts as the Court may determine." *Chaudoin* App. at 6.

[12] *Chaudoin* App. at 11.

[13] *Chaudoin* App. at 255.

[14] No. 73-1595.

seniority list and its holding that the list had been compiled in a "fair and equitable manner." Our jurisdiction to review such orders derives from the Federal Aviation Act of 1958,[15] which provides that orders of the Board "shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia," [16] and that "the court shall have *exclusive jurisdiction* to affirm, modify, or set aside the order complained of . . . ." [17] Congress having thus provided a statutory scheme whereby matters of airline merger, including the fair and equitable integration of seniority lists, are vested in the Civil Aeronautics Board subject *only* to review in the courts of appeals, collateral attacks thereon are impermissible.[18]

Appellants in the cases at bar have all had their day in court as contemplated by the statute.[19] Viewed objectively, the actions below, although couched in terms of violations of the RLA and the ADEA, are essentially collateral

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[15] 49 U.S.C. § 1301 *et seq.*

[16] 49 U.S.C. § 1486(a).

[17] 49 U.S.C. § 1486(d) (emphasis added).

[18] *See City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 334-37 (1958) (exclusive jurisdiction of courts of appeals to review decisions of the Federal Power Commission precludes collateral attack. While the court of appeals decision had already become final in *Tacoma*, the Court's language as to exclusivity would seem to apply whether appellate review had already been instituted or not. The petition to the Board to exercise its reserved jurisdiction, on which our review in *Northeast Master Executive Council* is based, was prior to the District Court actions in *Carey* and *Chaudoin*, although the petition to our court for review came a month after the District Court actions were begun.)

[19] The plaintiff class in *Carey* is congruent with those Northeast personnel represented by the petitioner in *Northeast Master Executive Council*. The smaller plaintiff class in *Chaudoin* is composed of Northeast personnel, all of whom were members of the larger *Carey* class.

attacks on the integrated seniority list as incorporated in the ALPA-Delta agreement of 26 October 1972, approved by the Civil Aeronautics Board, and reviewed by this court in *Northeast Master Executive Council.* We perceive no necessity for additional review, not contemplated by the Federal Aviation Act, in the District Court or any other forum.

The Seventh Circuit in *Oling* v. *Air Line Pilots Ass'n*[20] rejected the claim, brought by pilots aggrieved by the merger of Capital and United Air Lines, that the District Court had jurisdiction over a suit charging discrimination and other violations under the RLA. Like the case at bar, *Oling* involved "a situation where the Board acting within its jurisdiction and authority gave its approval to the merger upon condition that certain labor protective provisions be complied with including that pertaining to seniority integration . . . ."[21] The court held that the allegations made in the District Court were essentially the same as those made before the Board, and as such constituted an impermissible collateral attack on the Board's order.

Appellants over rely on the Board's statement in *Universal Airlines Company*[22] that it lacks jurisdiction over controversies of the type presented in these appeals, implying that the aggrieved pilots in that case had remedies available elsewhere. But when the Universal pilots' action in District Court—based on a claim of breach of duty of fair representation—was dismissed for lack of subject matter jurisdiction, the Sixth Circuit in *Kesinger* v. *Universal Airlines, Inc.*,[23] affirmed, citing *Oling*, and noting

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[20] 346 F.2d 270 (7th Cir. 1965), *cert. denied*, 382 U.S. 926 (1965).

[21] 346 F.2d at 275.

[22] *Universal Airlines Company, Universal Airlines, Inc., First Grant Corp. and American Flyers Airline Corp.*, Order No. 71-9-24, Docket 22123.

[23] 474 F.2d 1127 (6th Cir. 1973).

that "the CAB is not the final word concerning its own jurisdiction . . . and certainly not the final word concerning the jurisdiction of United States district courts." [24]

We follow the result reached in *Oling* and *Kesinger*. Our decision in *Southern Pilots Association* v. *CAB* [25] is not to the contrary. We said there that the Civil Aeronautics Board "has no jurisdiction to pass upon designations of bargaining agents or charges of discrimination in the representation function." [26] Yet that case, which involved an ordinary unfair representation claim based solely upon principles of labor law, did not arise in the context of an airline merger and subsequent compilation of an integrated seniority list. Consequently, we had no occasion in *Southern Pilots* to consider whether the Board does have jurisdiction over certain labor matters arising out of its approval of an airline merger on conditions involving the fair and equitable negotiated settlement of those labor matters.

III. Other Issues

Since we adopt the rationale of the Sixth and Seventh Circuits and hold as we do that the District Court has no jurisdiction over the actions below, we need not reach the questions of *res judicata* and collateral estoppel presented in *Chaudoin*. While it may have found other valid grounds on which to dismiss, the District Court had no more jurisdiction to hear that action that it had to hear *Carey*.

Accordingly, the judgments appealed from are

Affirmed.

Circuit Judge Edwards concurs in the result in Nos. 73-1608 and 73-1783.

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[24] 474 F.2d at 1131.

[25] 116 U.S. App. D.C. 283, 323 F.2d 288 (1963), *cert. denied*, 376 U.S. 954 (1964).

[26] 116 U.S. App. D.C. at 285, 323 F.2d at 290 (footnote omitted).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 609-73

ORDER

This cause is before the Court on the motion of the defendant Airline Pilots Association to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) Federal Rules of Civil Procedure.

The defendants urge, and the Court agrees, that exclusive jurisdiction over this controversy lies with the Civil Aeronautics Board, *Northeast Pilots Master Executive Council* v. *O'Donnell and ALPA,* C.A. 1911-72 (D.C.D.C.); *Hyland* v. *United Airlines,* 254 F.Supp. 367 (N.D. Ill. 1966). Accordingly, the motion to dismiss for lack of subject matter jurisdiction must be granted and it is this 1st day of May, 1973 so ORDERED.

.....
Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil No. 752-73

MEMORANDUM AND ORDER

I

Plaintiffs are flight deck crew members, 40 years of age or older, who are presently employed by Delta Airlines (hereinafter Delta). All are members of the Airline Pilots Association (ALPA) the designated bargaining agent for Delta flight deck crew personnel under the Railway Labor Act (hereinafter Northeast) before its merger with Delta on August 1, 1972. ALPA was also bargaining agent for plaintiffs while they were in the employ of Northeast prior to August 1, 1972.

Among the complex negotiations surrounding the Delta-Northeast merger were those within ALPA to prepare an integrated seniority list for the personnel of both airlines for use in ALPA dealings with Delta after the merger was concluded. This integrated list agreement was prepared on June 1, 1972.[1] Plaintiffs have concluded that it redounds to their disadvantage and have initiated several suits, including the instant case, which challenge its validity. The thrust of the present complaint is that the list, insofar as it affects flight personnel 40 years of age or older, violates the Age Discrimination in Employment Act, (ADEA) 29 U.S.C. Sec. 623.

Defendants Delta and ALPA have moved that this action be dismissed pursuant to Rule 12(b) FRCP. In the alternative defendants have moved for summary judgment.

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[1] The list was accepted by Delta on July 18, 1972.

After careful consideration of the memoranda filed by the parties, the Court concludes that defendants' motions to dismiss must be granted.

II

As noted above, plaintiffs have sought judicial and administrative relief from the provisions of the integrated seniority list in a number of forums.

On September 25, 1972 the former Northeast pilots, including plaintiffs, filed a complaint in this Court (*Northeast Pilots Master Executive Council* v. *O'Donnell and ALPA,* Civil Action No. 1911-72) seeking to enjoin ALPA from executing the agreement with Delta that incorporated the integrated seniority list. On October 4, 1972 the District Court (Jones, J.) granted the defendant ALPA's motion for summary judgment on the grounds that the exclusive jurisdiction over the dispute was vested in the Civil Aeronautics Board (CAB).

Meanwhile on October 3, 1972 the Northeast group had also petitioned the CAB to exercise its reserved jurisdiction and to issue an order requiring that the integrated seniority list be submitted to arbitration. On January 10, 1973, the CAB denied that request.

Thereafter on March 29, 1973 the Northeast group filed another complaint in this Court, *Carey* v. *O'Donnell,* Civil Action No. 609-73, alleging that ALPA had failed to represent them fairly and impartially in executing a labor contract with Delta which embodies the integrated seniority list. The *Carey* complaint was brought as a class action on behalf of all former Northeast flight deck crew members then employed by Delta, approximately 540 persons.[2]

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[2] The present class includes only 240 members, presumably all members of the Northeast group over 40 years of age. The ADEA restricts standing to sue under the act to persons over 40.

On May 16, 1973 this Court entered an order dismissing the *Carey* action on grounds that exclusive jurisdiction was vested in the CAB.[3]

In the meantime the plaintiffs instituted this action on April 19, 1973.

III

The Court finds that while the membership of the alleged class in the instant case is somewhat smaller than that before the Court in *Carey,* all members here were members of that plaintiff class as well. The Court also finds that while the defect alleged in *Carey* (*i.e.* unfairness under the Railway Labor Act) is different that the one considered now (*i.e.*, illegal age discrimination under the ADEA) each complaint goes to exactly the same question the validity of the integrated seniority list.

The Court never reached the merits of plaintiffs' claim in *Carey* because it held that exclusive jurisdiction over the question of the seniority list was vested in the CAB. As between the 240 crew members involved in this suit who were also members of the *Carey* class and the ALPA which was also before the Court in *Carey,* that May 16th opinion and order is *res judicata.*

As between the plaintiff class and Delta, *res judicta* is inapplicable since there is no identity of parties. However, the doctrine of collateral estoppel is applicable. While the rule laid down in the recent case of *Stebbins* v. *Keystone Insurance Co.* .... F.2d .... (D.C.C.A. June 5, 1973) limits the vitality of the doctrine in the situation where a dismissal by a court of first instance is based on determination of two issues, either of which standing alone would be sufficient to support the result, that rule has no applicabil-

[3] Plaintiffs appealed this decision to the U.S. Court of Appeals for the District of Columbia on May 31, 1973. The appeal is still pending.

ity here. The Court's May 16th order in *Carey* was based solely on the conclusion that exclusive jurisdiction over the issues raised in connection with the seniority list lay with the CAB. See *Northeast Pilots Master Executive Council* v. *O'Donnell and ALPA, supra;* and *Hyland* v. *United Airlines,* 254 F.Supp. 367 (N.D.Ill. 1966). That conclusion remains binding on plaintiffs here.[4]

Accordingly the plaintiffs are barred by the doctrine of collateral estoppel from relitigating the issue of jurisdiction once again in this Court notwithstanding the assertion of a different statutory basis.

It is therefore this 15th day of June, 1973

ORDERED that the defendants' motion to dismiss be granted.

Signatures illegible

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[4] The CAB has undoubted power to oversee the integration of employee seniority lists as part of its jurisdiction over airline mergers. Outland v. C.A.B., 284 F.2d 224 (D.C.C.A. 1960) Burger, Jr., 49 U.S.C. Sec. 1378.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, D. C. 20001

Hugh E. Kline
Clerk

November 1, 1974

Nos. 73-1595—Northeast Master Executive Council v. CAB
73-1608—W. Peter Carey, et al. v. J. J. O'Donnell
73-1783—Chaudoin v. Air Line Pilots Ass'n

J. Gordon Forester, Jr., Esq.
1750 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Dear Mr. Forester:

This is to inform you that your suggestions for rehearing *en banc* in the above cases were transmitted to the full Court, and there not being a majority of the Circuit Judges of this Court in favor of having a rehearing *en banc,* it is not anticipated that any further action will be taken with respect thereto.

Yours very truly,

/s/ HUGH E. KLINE
Hugh E. Kline
Clerk

HEK/bjg

CC: Gary Green, Esq.
Robert Reed Gray, Esq.
Robert L. Toomey, Esq.
Howard E. Shapiro, Esq.
James W. Callison, Esq.

APPENDIX E

Railway Labor Act, 45 U.S.C. 151, § 156.

Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

May 20, 1926, c.347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197.

Railway Labor Act, 45 U.S.C. 151, § 152 Seventh.

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Age Discrimination in Employment Act, 29 U.S.C. 621, 623.

§ 623. Prohibition of age discrimination—Employer practices.

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

§ 626

(c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

28 U.S.C. 1337

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. June 25, 1948, c.646, 62 Stat. 931.

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	2
STATEMENT	2
A. Background	2
B. District Court Proceedings	5
C. Decision of the Court of Appeals	6
ARGUMENT	7
CONCLUSION	12
APPENDIX	1a

CITATIONS

CASES:

Alexander v. *Gardner-Denver Co.*, 415 U.S. 36 (1974)	11
Allied Air Freight, Inc. v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir. 1968), certiorari denied, 393 U.S. 846 (1968)	10, 11
Amazon Cotton Mills Co. v. *Textile Wkrs. Union*, 167 F.2d 183 (4th Cir. 1948)	9
American Airlines v. *CAB*, 445 F.2d 891 (2d Cir. 1971), certiorari denied, 404 U.S. 1015 (1972)	12
American-Trans Caribbean Merger Case, CAB Order 71-5-30, Docket 21028 (May 7, 1971)	12
Bell v. *Hood*, 327 U.S. 678 (1946)	8
Braniff-Mid Continent Merger Case, 17 CAB 19 (1953)	12
Callanan Road Improvement Co. v. *United States*, 345 U.S. 507 (1953)	9
City of Tacoma v. *Taxpayers of Tacoma, et al.*, 357 U.S. 320 (1958)	9
Consolo v. *F.M.C.*, 383 U.S. 607 (1966)	9
Flight Engineers Int'l Assn. v. *Eastern Air Lines*, 359 F.2d 303 (2d Cir. 1966)	9

Page

Great Western Broadcasting Corp. v. *Hoffman*, 214 F. Supp. 173 (N.D. Calif. 1963) 9
Holman v. *Southern Airways, Inc.*, 210 F. Supp. 407 (N.D. Ga. 1962) 10
Hughes Tool Co. v. *Trans World Airways, Inc.*, 409 U.S. 363 (1973) 9, 11
Humphrey v. *Moore*, 375 U.S. 335 (1964) 8
Hyland v. *United Air Lines, Inc.*, 254 F. Supp. 367 (N.D. Ill. 1966) 10
Int'l. Longshoremen's, etc., Local 6 v. *Sunset Line & Twine Co.*, 77 F. Supp. 119 (N.D. Calif. 1948) 9
Kesinger v. *United Air Lines, Inc.*, 474 F. 2d 1127 (6th Cir. 1973) 10
Lambert Run Coal Co. v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377 (1922) 9
McGuire v. *Humble Oil & Refining Co.*, 355 F.2d 352 (2d Cir. 1966), certiorari denied, 384 U.S. 988 ... 9
Macklin v. *Spector Motor Freight Systems, Inc.*, 478 F.2d 979 (1973) 11
Marine Terminal v. *Rederi. Transatlantic*, 400 U.S. 62 (1970) 9
North Atlantic Route Transfer Case, 12 CAB 422, 14 CAB 910 (1951) 12
Northeast MEC v. *O'Donnell*, — F. Supp. —, 81 LRRM 2731 (D.C. D.C. 1972) 10
Oling v. *Air Line Pilots Ass'n*, 346 F.2d 270 (7th Cir. 1965), certiorari denied, 382 U.S. 926 (1965) 10
Operating Engineers, Local 148 v. *Operating Engineers, Local 2*, 173 F.2d 557 (8th Cir. 1949) 9
Order of Railway Conductors v. *Pennsylvania R.R. Co.*, 323 U.S. 166 (1944) 9
Roberts v. *Lehigh & New England Ry.*, 323 F.2d 219 (3rd Cir. 1963) 9
Smith Steel Co. v. *A. O. Smith Corp.*, 420 F.2d 1 (7th Cir. 1969) 9
S.S.W., Inc. v. *Air Transport Ass'n of America*, 191 F.2d 658 (D.C. Cir. 1951), certiorari denied, 343 U.S. 955 (1952) 10, 11
Taylor County Sand Co. v. *Seaboard Coast Line R. Co.*, 446 F.2d 853 (5th Cir. 1971) 9
United States v. *Corrick*, 298 U.S. 435 (1936) 9
Whitney National Bank v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965) 9

STATUTES: Page

Age Discrimination in Employment Act
29 United States Code Sec. 623 6

Civil Rights Act of 1964
42 United States Code Sec. 1981 11

Federal Aviation Act of 1958, as amended (72 Stat. 731) 2
Section 408 7
Section 414 .....7, 11
Section 1006(a) (d) 8

28 United States Code
Sec. 1254(1) 2
Sec. 1331(a) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-608

W. PETER CAREY, ET AL., *Petitioners,*

v.

J. J. O'DONNELL, President of the Air Line Pilots Association, ET AL., *Respondents*

GEORGE S. CHAUDOIN, ET AL., *Petitioners,*

v.

AIR LINE PILOTS ASSOCIATION, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-7a), and the opinions of the district courts (Pet. 8a-12a) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 19, 1974 (Pet. 2), and petitioners' request for rehearing *en banc* was denied on November 1, 1974 (Pet. 13a). The petition for a writ of certiorari was filed on November 18, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The Federal Aviation Act of 1958 authorizes the Civil Aeronautics Board to condition its approval of air line mergers upon the imposition and maintenance of conditions designed to protect the public interest, including a condition requiring that employee seniority lists be integrated in a fair and equitable manner. Exclusive jurisdiction to review such Board orders is vested in the courts of appeals.

The question presented is whether employees aggrieved by such a merged seniority list may invoke district court jurisdiction to invalidate the list after the Board itself has rejected their challenge.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Appendix, *infra,* pp. 1a-3a and at Pet. 14a-15a.

STATEMENT OF THE CASE

A. Background

In the spring of 1972, the Civil Aeronautics Board approved the carriers' joint application for a merger of Northeast Airlines, Inc. (("Northeast") and Delta Air Lines, Inc. ("Delta") (Pet. 2). Consistent with its usual practice, the Board conditioned the merger upon the surviving carrier's acceptance of certain

provisions designed to protect affected employees. In particular, the Board directed that "provisions shall be made for the integration of [the previously-separate Delta and Northeast] seniority lists in a fair and equitable manner . . . ." The Board also expressly reserved jurisdiction to make future modifications in the employee protective conditions "as the circumstances may require" (J. A. 64-65, 184; Carey J. A. 26).[1]

Meanwhile, Respondent ALPA—the recognized bargaining representative for all pilots employed by both carriers—had already invoked its own mandatory internal procedures for seniority integration. Section XII of the ALPA Policy Manual provides specific guidelines for integrating pilot seniority lists when a merger so requires (J. A. 191-196). Each affected airline group is required to designate two pilot representatives for the purpose of attempting to negotiate a single integrated list; if their direct negotiations do not culminate in agreement, ALPA's President J. J. O'Donnell is authorized to invoke mediation or, ultimately, final and binding arbitration.

Section XII negotiations between Delta and Northeast pilot Merger Representatives began in the summer of 1971 and culminated in complete agreement on June 5, 1972 (J. A. 186; Carey J. A. 28). Thereafter, in accordance with its procedures, ALPA transmitted the June 1972 list to Delta management with a request for negotiation and adoption. By terms of an October 26, 1972, collective bargaining agreement, Delta agreed to

[1] Two separate cases were consolidated in the court of appeals. "J.A." refers to the joint appendix in *Chaudoin* v. *ALPA*, No. 73-1783. "Carey J.A." refers to pages of the joint appendix in *Carey* v. *O'Donnell*, No. 73-1608.

adopt the June 1972 seniority list and to modify its preexisting collective bargaining agreement with ALPA so as to permit the new list's implementation.

Shortly after the pilot Merger Representatives had negotiated and published the integrated list, in June 1972, the Northeast Master Executive Council ("MEC") conducted a special meeting at which it decided to "repudiate" the integrated list.[2] President O'Donnell was then urged to reject the integrated list, primarily upon the grounds that it was unacceptable to the seven-member MEC; O'Donnell, by letter dated August 1, 1972, declined (Pet. 3; J. A. 186-187, 204-208; Carey J. A. 29). As his letter explained, it is the Merger Representatives, not the MEC, who have complete and full authority to compile a merged list under ALPA merger policy. Once Merger Representatives have reached agreement, it was explained, no authority existed in the MEC to alter its terms (J. A. 207).

On October 4, 1972, the MEC invoked the jurisdiction of the Civil Aeronautics Board in an effort to void the integrated seniority list. The MEC petitioned the Board to exercise its reserved jurisdiction over the implementation of labor protective conditions on the grounds that the June 1972 list was "unfair" to Northeast pilots, that its terms had been repudiated by the MEC, and that the Northeast Merger Representatives should not have agreed to the list but should have acted instead pursuant to alleged limiting instructions from the MEC (J. A. 126-133). On January 10, 1973, the Board dismissed the MEC's petition (J. A. 184-190;

[2] Under ALPA's Constitution, a Master Executive Council ("MEC") is established as an administrative subdivision of ALPA; on each airline, pilots elect their own MEC (J.A. 185, n.2).

Carey J. A. 26-32). Based upon the undisputed facts, the Board concluded, no case had been spelled out warranting Board intervention.

The MEC subsequently filed a petition for review of that Board determination. *Northeast Master Executive Council* v. *CAB, et al.*, No. 73-1595. The U. S. Court of Appeals for the District of Columbia Circuit affirmed the Board's order on August 19, 1974. A petition for a writ of certiorari (No. 74-610) to review that judgment was also filed on November 18, 1974.

B. District Court Proceedings

1. Carey

On April 2, 1973, ALPA was served with a complaint (J. A. 231-236) seeking an injunction against further implementation of the merged seniority list, and damages of $75,000,000. *W. Peter Carey, et al.* v. *J. J. O'Donnell and ALPA,* Civil Action No. 609-73. The nominal plaintiffs in *Carey* were five former Northeast pilots, now employed by Delta, who sued on their own behalf and on behalf of all other former Northeast pilots now employed by Delta (J. A. 232; Carey J. A. 5).

The *Carey* complaint alleged that ALPA and O'Donnell had violated plaintiffs' Railway Labor Act ("RLA") rights by executing the October 26 agreement with Delta which embodied and implemented the merged seniority list (J.A. 232-234; Carey J.A. 6-7). Specifically, it was alleged that agreement discriminated unlawfully against former Northeast pilots and in favor of Delta pilots because ALPA and O'Donnell were, for reasons not disclosed, "hostile" to the Northeast pilots (J.A. 234; Carey J.A. 7).

On May 1, 1973, the Court granted the ALPA's motion to dismiss on the grounds that "exclusive jurisdiction over this controversy lies with the Civil Aeronautics Board . . ." (Pet. 4; J.A. 236; Carey J.A. 88).

2. Chaudoin

At about the same time, ALPA was served with yet another federal court complaint. *Chaudoin, et al.* v. *Air Line Pilots Association and Delta Air Lines, Inc.*, Civil Action No. 752-73 (J.A. 3-6). Like the prior action, *Chaudoin* was also brought (a) as a class action on behalf of the former Northeast pilots now employed by Delta and (b) to invalidate the integrated seniority list and the collective bargaining agreement which gives it effect (J.A. 6). Unlike *Carey*, however, plaintiffs in *Chaudoin* invoked the Age Discrimination in Employment Act (ADEA), 29 U.S.C., Section 623, *et seq.* in support of their claims of unfairness and discrimination.

On June 15, 1973, the district court issued a Memorandum and Order granting defendants' motion to dismiss. The doctrine of *res judicata*, the court held, barred the plaintiffs in *Chaudoin* from relitigating the holding of the court in *Carey*. Accordingly, the conclusion of the *Carey* court that exclusive jurisdiction over the subject matter lay with CAB was held binding upon plaintiffs in *Chaudoin* (J.A. 253-256).

C. Decision of the Court of Appeals

The court of appeals consolidated both cases and affirmed the judgments of dismissal:

> "Viewed objectively, the actions below, although couched in terms of violations of the RLA and the ADEA, are essentially collateral attacks on

> the integrated seniority list . . . approved by the Civil Aeronautics Board, and reviewed by this court in *Northeast Master Executive Council* [v. *CAB,* No. 73-1595]. We perceive no necessity for additional review, not contemplated by the Federal Aviation Act, in the District Court or any other forum." (Pet. 6a).

Having concluded that exclusive jurisdiction over these controversies lay with the Board, the court of appeals declined to reach the *res judicata* questions presented in *Chaudoin,* or other defenses (Pet. 7a).

ARGUMENT

The decision of the court of appeals is correct, and there is no conflict of decisions. Further review is not warranted.

The Federal Aviation Act of 1958 plainly manifests a Congressional intention to centralize the supervision of airline mergers, and to vest the Civil Aeronautics Board with broad authority—subject only to limited review in a court of appeals—to determine questions concerning the parties' compliance with the terms of the merger.

Thus, Section 408 prohibits air carrier mergers without prior Board approval, and authorizes the Board to condition its approval upon compliance with provisions aimed at protecting the public interest, including provisions requiring the fair and equitable integration of the previously separate seniority lists. Once the Board has issued an order under Section 408, the parties affected are subsequently relieved of all other legal restraints to the extent necessary for them "to do anything authorized, approved, or required by such order." Section 414. Furthermore, Section

1006(a) and (d) vests "exclusive jurisdiction" to review Board orders in the courts of appeals.

Accordingly, any exercise of district court jurisdiction over the *Carey* and *Chaudoin* complaints would have undermined the Congressional design, diluted CAB's regulatory authority and subjected the merger itself to the risk of potentially conflicting judgments. For those complaints aimed clearly at invalidating the same integrated pilot seniority list which CAB itself had initially directed the merger parties to compile, and subsequently approved.

Petitioners dispute none of the foregoing propositions, but seek review and reversal here on essentially two grounds. First, petitioners contend (Pet. 5-6, 13) that the district courts were compelled to exercise jurisdiction because the complaints asserted a "controversy [which] . . . arises under the . . . laws . . . of the United States", within the meaning of 28 U.S.C. 1331(a). This reflects a misconception of the rationale of the court of appeals.

The question below was not whether the complaints described a matter within the cognizance of a federal court at all. Compare *Bell* v. *Hood*, 327 U.S. 678 (1946). Rather, the question was whether a district court may adjudicate a matter which Congress has expressly committed to agency control, subject only to review in the courts of appeals.

That question was answered correctly here, in conformity with settled principles. Whatever might be said of complaints about a seniority merger undertaken outside the scope of CAB control and surveillance, see *Humphrey* v. *Moore*, 375 U.S. 335 (1964), the agency action here effectively precluded any inde-

pendent district court challenge to the merged seniority list.

In comparable situations, this Court itself has consistently refused to sanction any collateral attack upon agency orders issued pursuant to the Federal Aviation Act, or pursuant to other statutes similarly providing for limited agency action review. *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 389 (1973); *Marine Terminal* v. *Rederi. Transatlantic*, 400 U.S. 62, 69-72 (1970); *Consolo* v. *F.M.C.*, 383 U.S. 607, 613 (1966); *Whitney National Bank* v. *Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420-22 (1965); *City of Tacoma* v. *Taxpayers of Tacoma, et al*, 357 U.S. 320 (1958); *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507, 511-13 (1953); *United States* v. *Corrick*, 298 U.S. 435 (1936); *Lambert Run Coal Co.* v. *Baltimore & Ohio R.R. Co.*, 258 U.S. 377, 381-82 (1922); and see *Order of Railway Conductors* v. *Pennsylvania R.R. Co.*, 323 U.S. 166 (1944).[3] Moreover, in reliance upon that rationale, all of the courts which have considered the question agree that CAB has exclusive jurisdiction over employee complaints about

[3] In the lower federal courts, the rule against collateral attacks is likewise settled. *Taylor County Sand Co.* v. *Seaboard Coast Line R. Co.*, 446 F.2d 853 (5th Cir. 1971); *Smith Steel* v. *A. O. Smith Corp.*, 420 F.2d 1, 7 (7th Cir. 1969); *Flight Engineers Int'l Ass'n* v. *Eastern Air Lines*, 359 F.2d 303 (2d Cir. 1966); *McGuire* v. *Humble Oil & Refining Co.*, 355 F.2d 352, 357 (2d Cir. 1966), certiorari denied, 384 U.S. 988; *Roberts* v. *Lehigh & New England Ry.*, 323 F.2d 219, 222 (3rd Cir. 1963); *Operating Engineers, Local 148* v. *Operating Engineers, Local 2*, 173 F.2d 557, 559 (8th Cir. 1949); *Amazon Cotton Mills Co.* v. *Textile Wkrs. Union*, 167 F.2d 183 (4th Cir. 1948); *Int'l Longshoremen's etc., Local 6* v. *Sunset Line and Twine Co.*, 77 F. Supp. 119, 123 (N.D. Calif., 1948); *Great Western Broadcasting Corp.* v. *Hoffman*, 214 F. Supp. 173, 176-177 (N.D. Calif., 1963).

seniority lists compiled as a condition of an airline merger. *Kesinger* v. *United Airlines, Inc.*, 474 F.2d 1127, 1131-32 (6th Cir. 1973); *Oling* v. *Air Line Pilots Ass'n.*, 346 F.2d 270 (7th Cir. 1965) certiorari denied, 382 U.S. 926 (1965); *Hyland* v. *United Air Lines, Inc.*, 254 F. Supp. 367 (N.D. Ill., 1966); *Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407 (N.D. Ga., 1962); *Northeast MEC* v. *O'Donnell*, — F. Supp. —, 81 LRRM 2731 (D.C.D.C., 1972).

In all of these cases, too, the complaints adequately described an applicable federal law otherwise sufficient to invoke a district court's authority. But where, as here, the subject matter of the complaint was within the scope of an exclusive review procedure, the courts uniformly defer to that procedure and decline to sanction any collateral attack.

Petitioners' second asserted basis for avoiding this settled rule fares no better, and, indeed, is largely a restatement of the first. According to petitioners, their complaints involved "much more than simply the integration of seniority lists" (Pet. 9) and therefore provided a basis for independent district court action, as did the complaints in *S.S.W. Inc.* v. *Air Transport Ass'n of America*, 191 F.2d 658 (D.C. Cir., 1951), certiorari denied, 343 U.S. 955 (1952); and *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 393 F.2d 441 (2d Cir. 1968), certiorari denied, 393 U.S. 846 (1968).

But petitioners' complaints did not allege any wrongdoing except for the compilation of an integrated seniority list and the execution of the collective bargaining agreement which gave it effect (J.A. 3-6; 231-236). In these circumstances, the subject matter of the complaints is identical to the subject matter vested

in CAB and the court of appeals; there is no independent basis for district court action. *S.S.W.*, and *Allied, supra,* are distinguishable because the disputed conduct there had never been the subject of a prior Board approval order, and therefore did not qualify for Section 414 immunity and exclusive review in a court of appeals. Compare *Hughes Tool Co., supra.*

Finally, *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974) and *Macklin* v. *Spector Motor Freight Systems, Inc.,* 478 F.2d 979 (1973) are also inapposite. Both cases arose under the Civil Rights Act of 1964, 42 U.S.C. Section 1981, a statute not invoked here. None of the references there to the propriety of parallel or overlapping remedies (415 U.S. at 43) were aimed at the RLA or the ADEA, upon which petitioners relied. Moreover, neither case involved a collateral attack upon the order of a government agency. District court jurisdiction in the cited cases was upheld despite the plaintiffs' prior submission of discrimination claims to an arbitrator selected pursuant to a collective bargaining agreement. This Court's explanation, in *Alexander,* of the special reasons why private arbitration is an inappropriate forum for the final resolution of Title VII rights have no application to CAB.

Thus, the arbitrator, unlike CAB, has an obligation to "follow the agreement" rather than to enforce public law and, unlike CAB, is chosen by the parties because of his specialized competence in discerning the "law of the shop". CAB procedures, on the other hand, can provide the formality and compulsory process of judicial fact-finding, and CAB's commitment to a "fair and equitable" seniority list, as a

matter of public law, assures that a showing of *any* form of invidious discrimination will evoke an agency response.[4]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondents

December 1974.

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[4] See, e.g., *North Atlantic Route Transfer Case*, 12 CAB 422, 424; 14 CAB 910 (1951); *Braniff-Mid Continent Merger Case*, 17 CAB 19 (1953); *American -Trans Caribbean Merger Case*, CAB Order 71-5-30, Docket 21028 (May 7, 1971), aff'd *sub nom. American Airlines* v. *CAB*, 445 F.2d 891 (2d Cir., 1971), certiorari denied, 404 U.S. 1015 (1972).

APPENDIX

The relevant portions of the Federal Aviation Act of 1958, as amended, 72 Stat. 737, 49 U.S.C. 1301, *et seq.* are:

CONSOLIDATION, MERGER, AND ACQUISITION OF CONTROL

Acts Prohibited

Sec. 408(a)

It shall be unlawful unless approved by order of the Board as provided in this section—

> (1) For two or more air carriers, or for any air carrier and any other common carrier or any person engaged in any other phase of aeronautics, to consolidate or merge their properties, or any part thereof, into one person for the ownership, management, or operation of the properties theretofore in separate ownerships;
>
> * * *

Power of Board

Sec. 408(b)

Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeoparadize another air carrier not a party to the consoli-

dation, merger, purchase, lease, operating contract, or acquisition of control:

* * *

LEGAL RESTRAINTS

Sec. 414

Any person affected by any order made under sections 408, 409, or 412 of this Act shall be, an is hereby, relieved from the operations of the "antitrust laws", as designated in section 1 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

* * *

JUDICIAL REVIEW OF ORDERS

Sec. 1006

(a) Any order, affirmative or negative, issued by the Board or Secretary of Transportation under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Venue

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Secretary of Transportation by the Clerk of the Court, and the Board or Secretary of Transportation shall thereupon file in the court the

record, if any, upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code.

Power of Court

(d) Upon transmittal of the petition to the Board or Secretary of Transportation, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Secretary of Transportation. Upon good cause shown and after reasonable notice to the Board or Secretary of Transportation, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

Findings of Fact Conclusive

(e) The findings of facts by the Board or Secretary of Transportation, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Secretary of Transportation shall be considered by the court unless such objection shall have been urged before the Board or Secretary of Transportation or if it was not so urged, unless there were reasonable grounds for failure to do so.

Certification or Certiorari

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Secretary of Transportation shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of title 28, United States Code.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-608

W. PETER CAREY, *et al.*,
Petitioners,
v.
J. J. O'DONNELL, President of Air Line Pilots Association, *et al.*,
Respondents

GEORGE S. CHAUDOIN, *et al.*,
Petitioners,
v.
AIR LINE PILOTS ASSOCIATION, *et al.*,
Respondents

BRIEF FOR RESPONDENT DELTA AIR LINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
BRIEF FOR RESPONDENT DELTA AIR LINES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI	1
QUESTION PRESENTED	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
ARGUMENT	5
CONCLUSION	10

TABLE OF AUTHORITIES

CASES:

Holman v. *Southern Airways, Inc.*, 210 F.Supp. 407 (N.D. Ga. 1962)	6
Hyland v. *United Air Lines, Inc.*, 254 F.Supp. 367 (N.D. Ill., 1966)	6, 8, 9
Kesinger v. *Universal Airlines, Inc.*, 474 F.2d 1137 (6th Cir. 1973)	4, 6, 8
Northeast Pilots MEC v. *O'Donnell and ALPA*, Civil Action No. 1911-72 (D.D.C., October 4, 1972), 69 CCH Labor Cases ¶ 13,200	3
Oling v. *Air Line Pilots Ass'n*, 346 F.2d 270 (7th Cir. 1965), *cert. den'd*, 382 U.S. 926 (1965)	4, 6, 7
Pan American World Airways, Inc. v. *United States*, 371 U.S. 296 (1963)	9

STATUTES:

Age Discrimination Employmnet Act 29 U.S.C. § 623 (f) (2)	5
Federal Aviation Act of 1958	
49 U.S.C. § 1378	2, 5
49 U.S.C. § 1486	2, 5, 6

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QUESTION PRESENTED

Respondent Delta Air Lines, Inc. (Delta), believes that petitioners' statement of the question presented is incomplete and accordingly restates the question as follows:

Did the Court of Appeals err in holding that the District Court had no jurisdiction over the subject matter of these cases which, although couched in terms of violations of federal statutes, are essentially collateral attacks upon an order of the Civil Aeronautics Board dismissing objections to an integrated seniority list arising out of an airline merger over which the Civil Aeronautics Board and the Courts of Appeals have exclusive jurisdiction pursuant to the Federal Aviation Act of 1958?

STATUTES INVOLVED

The petitioners have failed to cite the most important statute involved in these cases as decided below, *i.e.*, the Federal Aviation Act of 1958, 49 U.S.C. §§ 1378 and 1486. Section 1378 gives the Civil Aeronautics Board (CAB or Board) jurisdiction over airline mergers and § 1486 confers exclusive jurisdiction to review orders of the Board upon the Courts of Appeals.

STATEMENT OF THE CASE

Delta accepts as generally correct petitioners' Statement of the Case concerning the court proceedings to date. The section of the statement which petitioner calls "Background", however, omits several important points. For a comprehensive statement of the case, Delta calls the Court's attention to the opinion of the Court of Appeals in these cases[1] and, of equal importance, the opinion of the Court of Appeals in *Northeast Master Executive Council* v. *Civil Aeronautics Board*, which is a closely related case decided on the same day as these cases.[2] Each of the opinions of the Court of Appeals

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[1] See Appendix A to the petition, beginning at p. 1a.

[2] A copy of that opinion is appended to the Petition for a Writ of Certiorari in case No. 74-610, filed in this Court concurrently with the filing of the petition in these cases.

refers to the other and the opinions must be read together for a complete understanding of the proceedings below.

Briefly summarized, these cases arise out of the labor protective provisions imposed by the CAB in connection with its approval of the merger of Northeast Airlines, Inc., into Delta in 1972. As a part of its labor protective provisions, the CAB required, as it has in all airline mergers in recent history, that seniority lists be integrated in a "fair and equitable manner." This was accomplished through invocation of the traditional internal procedures of the Air Line Pilots Association (ALPA), the union which represented the pilots of both carriers.

Pursuant to these procedures, each pilot group elected two representatives to negotiate an integrated seniority list and, after extended negotiations, a list was agreed to and subsequently accepted by Delta. Some of the Northeast pilots objected to the list and sought to repudiate it, first through ALPA, then through a suit in the District Court, then through the CAB and finally through the cases now before this Court. ALPA rejected these attempts at repudiation pointing out that the applicable procedures had been followed; the District Court rejected a request to enjoin implementation of the list on the grounds that the matter was within the exclusive jurisdiction of the CAB,[3] and the CAB carefully reviewed the objections to the list and dismissed them on the grounds that the list was negotiated in accordance with normal procedures and that there was no allegation (much less proof) of any bad faith whatsoever. The dissatisfied pilots then brought these suits in the District Court alleging violations of the Railway Labor Act in the *Carey*

[3] *Northeast Pilots MEC* v. *O'Donnell and ALPA*, Civil Action No. 1911-72 (D.D.C., October 4, 1972), 69 CCH Labor Cases ¶ 13,200.

case and of the Age Discrimination in Employment Act (ADEA) in the *Chaudoin* case.

The District Court dismissed the complaints on the basis of exclusive jurisdiction of the CAB, collateral estoppel and *res judicata*. The Court of Appeals affirmed on the basis of exclusive jurisdiction, pointing out that the sole remedy in the courts in connection with matters arising out of an airline merger is through review of orders of the CAB in the Courts of Appeals. In a companion decision, the Court of Appeals also upheld the CAB's order dismissing objections to the integrated seniority list.

REASONS FOR DENYING THE WRIT

This Court should deny the petitioners' request for a writ of certiorari because these cases most clearly do not fall within the Court's guidelines governing review on certiorari. (See this Court's Rule 19.) The petitioners do not present any special or important reasons for granting the writ; they are merely dissatisfied with the result below.

There are no conflicts with the decisions of other Courts of Appeals and, indeed, the decisions below follow and are consistent with the decisions of other Circuits on the points in question, one of which this Court has declined to review on certiorari.[4] Moreover, there are no novel or unusual questions which require the attention of this Court. Petitioners have merely attempted in these cases to challenge an order of the CAB with respect to integration of seniority lists by attaching different labels to their challenges and attempting to proceed under various federal statutes. The courts below correctly found

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[4] *Oling* v. *Air Line Pilots Ass'n*, 346 F.2d 270 (7th Cir. 1965), *cert. den'd*, 382 U.S. 926 (1965); *Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1127 (6th Cir. 1973).

that these challenges must fail because of the exclusive jurisdiction of the CAB and the Courts of Appeals under the Federal Aviation Act of 1958, 49 U.S.C. §§ 1378 and 1486.

ARGUMENT

Petitioners do not present *any* substantive questions of law, but base their request for a writ of certiorari solely upon a jurisdictional question. At page 7 of their petition they say:

> "The petitioners here do not submit on the merits but on the denial of a forum on a jurisdictional basis when the statutory right is clear."

Thus, the petitioners have limited their case to the narrow question of whether the Court of Appeals properly concluded that exclusive jurisdiction of the petitioners' claims is in the CAB and, on review, in the Courts of Appeals.

Petitioners cite a number of cases in support of the general proposition that district courts have jurisdiction over disputes arising under the Railway Labor Act, the ADEA and other federal statutes. Delta does not dispute the validity of those cases, but they are not apposite here because of the circumstances out of which the instant cases arise.

While petitioners nominally have pleaded violations of the Railway Labor Act and the ADEA, it is not disputed by petitioners (and the complaints show) that the basis of the action in both cases is the integrated seniority list required by the CAB as a condition to its approval of the Delta-Northeast merger.[5] This being so, the ques-

[5] Aside from the fact that the complaints in these cases in actuality are collateral attacks upon an order of the CAB, the ADEA specifically provides that it shall not be unlawful to observe the terms of a bona fide seniority system. 29 U.S.C. § 623 (f)(2).

tion is whether petitioners may be allowed to challenge the integrated list in numerous forums on as many bases as they may find statutes to provide labels, or must they present all of their claims to the CAB, subject to review in the Courts of Appeals. The answer is found in the Federal Aviation Act, 49 U.S.C. §§ 1378 and 1486, and in the uniform decisions of the Courts of Appeals and District Courts across the nation. *Oling* v. *Air Line Pilots Ass'n*, 346 F.2d 270 (7th Cir. 1965), *cert. den'd*, 382 U.S. 926 (1965) *Kesinger* v. *Universal Airlines, Inc.*, 474 F.2d 1137 (6th Cir. 1973); *Holman* v. *Southern Airways, Inc.*, 210 F. Supp. 407 (N.D. Ga. 1962); *Hyland* v. *United Air Lines, Inc.*, 254 F. Supp. 367 (N.D. Ill., 1966).

The *Oling* case was quite similar to the instant cases in that it involved the integration of a pilots seniority list in the context of an airline merger. There also a number of pilots were dissatisfied with the integrated list (as has been the case in virtually *every* airline merger) and petitioned the CAB to set aside the list. The CAB found no basis for granting relief and dismissed the petition. The pilots did not appeal the CAB's order, but brought suit in the District Court in Chicago alleging that the integrated list resulted from unfair representation by their union, in violation of the "fair representation" requirements of the Railway Labor Act. The District Court dismissed the case and the Seventh Circuit Court of Appeals affirmed on the basis of the exclusive jurisdiction of the Courts of Appeals to review CAB orders. After noting the exclusive review provisions of 49 U.S.C. § 1486, the Court said:

> "The cases firmly establish the principle that where Congress has provided a statutory procedure for the review of an administrative order, such procedure is exclusive. A recent case much in point is Whitney National Bank v. Bank of New Orleans &

Trust Co, et al., 379 U.S. 411, 85 S.Ct. 551, 13 L.Ed. 2d 386.

* * * *

"The instant case is even stronger against plaintiffs on the point under discussion because here the statute lodges 'exclusive jurisdiction' in the reviewing court while in Whitney such jurisdiction was found by implication.

The Court went on to quote from a district court case in which the same questions had been raised and then concluded that the dismissal below had been correct:

"Another case much in point is Holman et al. v. Southern Airways, Inc., 5 Cir., 210 F.Supp. 407, wherein the District Court dismissed the complaint and denied the relief requested on the ground that the suit, couched in the terms of a violation of petitioners' contract rights and of their right to fair representation, was in reality an attempt to review a CAB order. Among other things the Court stated (page 410):

'This Court is convinced that it does not have jurisdiction to grant the plaintiffs the relief they seek, inasmuch as jurisdiction to review orders of the Civil Aeronautics Board is vested exclusively in the Circuit Courts of Appeals.'

* * * *

'It seems to this Court that if the plaintiffs are dissatisfied with the order of the Board, they could, pursuant to the provisions of 49 U.S.C.A. § 1486, of the Civil Aeronautics Act, procure a judicial review of the order * * * However, in the face of the expressed intention of the Congress to vest exclusive jurisdiction in the various Courts of Appeals to review orders of the Civil Aeronautics Board, this Court feels that any relief, injunctive or otherwise, must be had either from such Courts of Appeals or from

> the administrative agency in whose jurisdiction the proceedings originated—in this case, the Civil Aeronautics Board.' "
>
> * * * *
>
> "The conclusion is inescapable that plaintiffs sought a review of the final order entered by CAB on April 24, 1964. Stated otherwise, their action constitutes a collateral attack upon such order. As we have shown, this is not permissible under the law. For this reason the District Court properly dismissed the complaint."

The Sixth Circuit Court of Appeals following *Oling* in the very recent case of *Kesinger* v. *Universal Airlines, Inc., supra*, In the *Kesinger* case also the plaintiff alleged a violation of the duty of fair representation under the Railway Labor Act, just as the plaintiffs have here in the *Carey* case. There the court said:

> "The appellants have alleged that the union has engaged in conduct that breaches its duty of fair representation. ALPA asserts that even if these allegations are true, they would constitute a breach of the labor protective provisions of the merger, and consequently the appellants' remedy must lie, if at all, before the CAB. Oling v. Air Line Pilots Ass'n, supra.
>
> "Upon the authority of Oling v. Air Line Pilots Association, supra, and for reasons which we believe to be consistent with the statutory scheme of the Federal Aviation Act (49 U.S.C. § 1301 et seq. (1971)), we conclude that the appellants' exclusive remedy was to appeal the CAB's denial of the relief sought to a court of appeals."

The reason that the exclusive jurisdiction of the CAB and the Courts of Appeals must be maintained, *even when violations of other statutes are alleged*, was well-stated by the District Court in the *Hyland* case:

> "This important area of the total complex of merger considerations cannot be subject to independent scrutiny and interference by the courts pursuant to a separate statutory scheme. *The parties affected by the CAB merger order cannot be required to answer in different forums at different times on different charges for actions taken under the CAB merger umbrella.* Were this court to hear this case, it would be directly entering an area over which the CAB has properly reserved jurisdiction; were the relief prayed for to be granted here, the orders and interests of the CAB might be undermined. Congress cannot have intended such a collision. This is the thrust of Pan American and § 414. See Brotherhood of Locomotive Engineers v. Chicago & North Western Railway Co., [46 LC ¶ 18,125] 314 F.2d 424, 431-32 (8th Cir. 1963). The CAB must be permitted to consider the charges of this complaint in the total context of the merger and in light of the public interest which it is charged with protecting under § 408 [49 U.S.C. § 1378]" (emphasis added)

The reasoning of the court in *Hyland* was, in turn, based on this Court's rationale in *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963). In that case this Court explained the necessity of exclusive jurisdiction to avoid collisions of statutory schemes. Referring to that decision, the *Hyland* court said:

> "The Court based its decision on several traditional exclusive jurisdiction arguments. The matters in issue were held to be 'basic in this regulatory scheme.' The Court said that 'the acts charged in this civil suit as antitrust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers. . . .' 371 U.S. at 305. The Court was concerned with the fact that 'if the courts were to intrude independently with their construction of the anti-trust laws, two regimes might collide.' 371 U.S. at 310.

> 'It would be strange, indeed, if a division of territories or an allocation of routes which met the requirements of the "public interest" as defined in § 2 (of the Aviation Act) were held to be anti-trust violations. It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the anti-trust laws.' 371 U.S. at 309."

The petitioners have ignored and failed to even attempt to distinguish the above cases which dispose of all of petitioners' arguments. Nevertheless, the law is clear and the petitioners have no case for the grant of a petition for certiorari. All of their complaints are with respect to the compilation of the integrated seniority list. The CAB and the Courts of Appeal on review, have exclusive jurisdiction of these complaints. This exclusive jurisdiction may not be sidestepped by alleging violations of various federal statutes and the "jurisdictional" arguments raised by petitioners clearly are inapplicable.

CONCLUSION

For the reasons discussed above, Delta prays that this Court will not issue a writ of certiorari in the above cases.

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